Nos. 75-1289, 75-1299, 75-1304, 75-1305, 75-1308, and 75-1474

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE CALIFORNIA COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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INDEX

CITATIONS

Cases:

Page

Page

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QUESTIONS PRESENTED

1. Whether the rulemaking procedures followed by the Federal Power Commission in establishing a nationwide ceiling rate for new sales of natural gas satisfied the requirements of the Natural Gas Act and the Administrative Procedure Act.

2. Whether the court of appeals applied the correct standard of review in affirming the Federal Power Commission's orders.

3. Whether the Federal Power Commission properly determined that the national rate may be applied to ongoing sales of natural gas if the original contract

expires of its own terms, a renewal contract is executed, and one of those events occurs on or after January 1, 1973.

4. Whether the Federal Power Commission correctly determined that natural gas sold at the national rate could not be used to discharge refund obligations or trigger contingent escalations under the incentive provisions of prior area rate orders.

5. Whether the cost methodology employed by the Federal Power Commission is reasonable and supported by substantial evidence.

STATEMENT

1. On April 11, 1973, the Federal Power Commission commenced by public notice a rulemaking proceeding to establish the maximum just and reasonable rates for jurisdictional sales of natural gas on a nationwide basis (38 Fed. Reg. 10014). The single uniform rate was to apply to all jurisdictional sales of natural gas produced from wells commenced on or after January 1, 1973. The notice made all large producers respondents to the ratemaking proceeding, provided for the submission of sworn written comments from all interested parties as well as the named respondents, and was accompanied by a staff study on the estimated nationwide cost of finding and producing new natural gas supplies. In the notice, the Commission did not propose any specific rate, terms, or conditions and stated that it would rely instead upon the information contained in the responses submitted by the various parties and the staff study.[1]

[1]On March 21, 1974, the original notice of rulemaking was supplemented by the issuance of a revised notice in which staff cost estimates were updated to reflect 1972 data concerning drilling costs and reserve additions (39 Fed. Reg. 11310). The study indicated that the American Gas Association (AGA) reserve additions for 1971 and 1972 might have been understated by approximately 1.7 trillion cubic feet. Since the AGA data had played an important role in the Commission's cost analysis, comments were invited concerning this apparent disparity. A public conference was held, and the AGA was unable to refute the staff's finding. The Commission's cost analysis therefore included the finding that "the reserve additions as reported by the AGA for 1971 and 1972 are understated by approximately 1.7 Tcf" (Pet. App. C55-C56).

Following the receipt of extensive initial and reply comments and evidentiary presentations, the Commission, on June 21, 1974, issued Opinion No. 699 (Pet. App. C), establishing a new national rate structure for producer sales that was designed to alleviate the increasingly critical gas supply shortage while maintaining reasonable prices (*id.* at C120). The salient features of the rate structure were:

> 1. A base rate of 42.0¢ per Mcf (with annual escalations of 1.0¢ per Mcf) subject to various adjustments.
>
> 2. A biennial review to prescribe prospective just and reasonable rates for those sales that qualify for the national rate.
>
> 3. Provisions for special relief from the national rate.

The base rate would apply to three classes of sales:

> 1. Sales made from wells commenced on or after January 1, 1973.
>
> 2. Sales made pursuant to a contract executed on or after January 1, 1973, for the sale of gas in interstate commerce, if the gas has not previously been sold in interstate commerce except under short-term or emergency sales procedures of the Commission's regulations.

3. Sales made pursuant to a renewal contract, if the sales were formerly made pursuant to a permanent certificate of unlimited duration under a contract that expired by its own terms, and if either the renewal contract was executed or the original contract expired on or after January 1, 1973.[2]

As part of the total rate structure the Commission also determined that natural gas sold at the new national rate could not be used to discharge refund obligations or to trigger contingent escalations under the incentive provisions of its orders in four prior area rate proceedings (Pet. App. C109-C111). Rather, producers who elect to discharge their existing refund obligations or who desire to obtain the contingent escalations for flowing gas under these prior area rate orders will be required to price the flowing gas at the rate established in the area rate orders. The Commission found this treatment "equitable since the rates established in those opinions were determined to be sufficient to encourage exploration and development activities when coupled with the [incentives]" (*id.* at C110). It stated that "[t]o allow producers to collect the [national] rate * * * and to discharge their existing obligations * * * with the same supplies of natural gas would be contrary to the spirit of the applicable area rate opinion" and would allow

[2]This statement of the third sales category, the so-called "renewal contract" provision, encompasses later amendments to the original order. As originally stated, the category was limited to renewal contracts executed on or after January 1, 1973, which replaced contracts expiring on or after that date. The provision was later amended to include renewal contracts executed on or after January 1, 1973, even if the primary contract expired prior to that date (Opinion No. 699-A). The provision was amended further to include renewal contracts executed prior to Janaury 1, 1973, to replace primary contracts expired or expiring on or after that date (Pet. App. D43-D45).

producers to "receive a double benefit from the rate structure which we establish in this decision" (*ibid.*).

Subsequently, in Opinion No. 699-H, the Commission increased the rate ceiling for "new gas" sales from 43.0¢ to 50.0¢ per Mcf, following a supplemental cost analysis "to assure that the rate allowed for new gas supplies adequately reflects the true cost of those supplies" (Pet. App. D15).

2. On petitions for review, the court of appeals affirmed the Commission's orders (Pet. App. A). The court ruled that the Commission could properly establish a national rate for new sales of gas by rulemaking without "adversarial trial procedures such as formal evidentiary hearings, oral testimony, and oral cross-examination" (*id.* at A23). "The procedures used in setting the national rate neither prejudiced [the participants], nor prevented a full and true disclosure of the facts" (*id.* at A25). In "an undertaking so massive and novel as setting a national rate for new gas, the proceeding would have taken years, and the Commission's power to effectively regulate the industry would have been destroyed," if the Commission had "allowed all interested parties to submit oral testimony and conduct oral cross-examination" (*id.* at A26-27).

The court also rejected each of the other attacks on the order that are reiterated in the present petitions:

(a) The Commission's cost methodology was attacked from both sides, some parties claiming that it led to a national rate for new gas that was inadequate to generate capital for future exploration and others contending that the resulting rate was too high. The court of appeals, however, approved the Commission's cost-based methodology and concluded that the national rate

was within the zone of reasonableness accorded by reviewing courts to Commission action (*id.* at A31-A41).[3]

(b) The court also sustained the application of the new national rate to certain renewal contracts replacing old contracts for flowing gas. The court held (*id.* at A28-A30) that the Commission could properly make the rate for flowing gas bear part of the cost burden of financing added exploration. "The Commission found from evidence in the record that a massive commitment of new funds is necessary to alleviate the natural gas shortage and that internally generated sums are a necessary source of such funds" (*id.* at A29). The court therefore upheld the Commission's determination "that the national rate structure should be functionally applied to provide some of these funds, placing the burden not just on 'new' gas but also on flowing gas for which the primary contract had expired" (*id.* at A30).

(c) Finally, the court of appeals sustained the Commission's determination that natural gas sold at the national rate could not be used to discharge refund obligations or to trigger contingent escalations (*id.* at A41-A42). The court held that this feature of the new national rate did not constitute "an improper retro-

[3]The Commission's cost analysis was based upon the methodology developed in the first *Permian Basin Area Rate Proceeding*, 34 F.P.C. 159. The Commission found that the record evidence supported a range of reasonable costs, and it selected a rate within the range of rates supported by those costs that "will provide the incentive necessary to encourage producers to undertake expanded exploration and development programs and to dedicate the natural gas discovered and produced as a result of those programs to the interstate market" (Pet. App. C120). In a departure from the *Permian* methodology, the Commission also employed a discounted cash-flow model in evaluating its cost findings "to assure that the rate allowed for new gas supplies adequately reflects the true cost of those supplies" (Pet. App. D15).

active modification of prior rate opinions" (*id.* at A42). "The new national rate is the product of an independent determination of incentives, and, as it is in so many other regards, the new rate structure is not tied to previous determinations. Replacing one incentive structure with another or, viewed in another light, providing a new alternative rate system, is an exercise of Commission discretion which does not amount to retroactive rate regulation" (*ibid.*).

ARGUMENT

The contentions raised in the petitions were carefully reviewed and correctly rejected by the court of appeals; further review by this Court is not warranted.

1. Petitioner American Public Gas Association (APGA) (Pet. No. 75-1304, pp. 6-11) contends that the Commission's use of a rulemaking process to establish the national rate violated both the Natural Gas Act and the Administrative Procedure Act. APGA argues that the Commission erred in failing to follow in these rate proceedings the formal hearing procedures of 5 U.S.C. 556 and 557. But those procedures—requiring a full evidentiary hearing before a hearing officer, an initial decision, and review by the Commission—are required for rulemaking only "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing" (5 U.S.C. 553(c)). Therefore, "Sections 556 and 557 need be applied 'only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be 'on the record'" *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757. This principle applies to agency ratemaking. *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224. Since neither the ratemaking provisions of the Natural

Gas Act (15 U.S.C. 717c, 717d) nor the rulemaking provision (15 U.S.C. 717o) requires a hearing "on the record," the formal hearing procedures of the Administrative Procedure Act are not required in the Commission's ratemaking.

APGA contends, however, that the provision in 15 U.S.C. 717r(b), making the Commission's findings conclusive if supported by substantial evidence, is the equivalent of an "on the record" requirement (Pet. No. 75-1304, p. 7). Concededly the precise words "on the record" are "not words of art, and * * *other statutory language having the same meaning could trigger the provisions of §§556 and 557 in ratemaking proceedings" *(Florida East Coast Railway Co., supra,* 410 U.S. at 238). But the three courts of appeals that have addressed the issue, including the court of appeals in this case, have uniformly concluded that neither the express provisions of the Natural Gas Act nor their legislative history requires a formal evidentiary hearing in Federal Power Commission ratemaking proceedings. *Mobil Oil Corp.* v. *Federal Power Commission,* 483 F.2d 1238 (C.A. D.C.); *American Public Gas Association* v. *Federal Power Commission,* 498 F.2d 718 (C.A. D.C.); *Phillips Petroleum Co.* v. *Federal Power Commission,* 475 F.2d 842 (C.A. 10), certiorari denied *sub nom. Chevron Oil Co.* v. *Federal Power Commission,* 414 U.S. 1146.

In any event, the words "substantial evidence" as used in 15 U.S.C. 717r(b) add nothing to the "after a hearing" language of 15 U.S.C. 717d(a), which by itself is insufficient to trigger the formal hearing requirements. *Allegheny Ludlum Steel Corp., supra.* When viewed in light of 15 U.S.C. 717n(b), which states that "[n]o informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation," the language

of 15 U.S.C. 717r(b) does not amount to an "on the record" requirement that would invoke the formal procedures of 5 U.S.C. 556 and 557.[4]

Finally, the decision below does not conflict with the District of Columbia Circuit's decision in *Mobil Oil Corp.* v. *Federal Power Commission, supra.* In *Mobil* the court held that, although a formal evidentiary hearing is not required for ratemaking, the less rigorous informal rulemaking standards of 5 U.S.C. 553 were insufficient. The court below, however, found that it was "unnecessary to enter the colloquy" between the *Mobil* court and other courts concerning the minimum procedures required for ratemaking, because the procedures followed by the Commission "went beyond the rudiments of informal rulemaking"(Pet. App. A23, A24).[5] Indeed, the court concluded that the procedures followed by the Commission

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[4]Even when a statute requires that the rulemaking procedure take place "on the record after opportunity for an agency hearing," thus making Section 556 applicable, subsection (d) of that section provides that the agency may proceed by the submission of all or part of the evidence in written form if a party will not be "prejudiced thereby." As the court below correctly held (Pet. App. A25), "[t]he procedures used in setting the national rate neither prejudiced the APGA, nor prevented a full and true disclosure of the facts."

[5]The promulgation of the national rate was preceded by a notice which "clearly indicated that the Commission intended to establish by rule nationwide rates for natural gas " (Pet. App. A23) and "provided for the submission of sworn written comments" (*id.* at A24). More than 80 parties "representing a broad range of consumer and gas industry interests" submitted "sworn testimony and evidentiary data" and were given the opportunity on a second round of submittals to "rebut both Commission and privately-generated evidence" (*ibid.*). Additionally, the Commission held a public conference on the issues concerning possible under-reporting of reserve additions and drilling footages and held two days of oral argument on its proposed orders (*ibid.;* see n. 1, pp. 2-3, *supra.*

"satisfie[d] even the more stringent requirements of the formal hearing process" (*id.* at A25). Thus, the question of what minimum procedures are necessary for ratemaking by rulemaking under the Natural Gas Act and the Administrative Procedure Act—the question before the District of Columbia Circuit in *Mobil*—is not present in this case.[6]

2. Petitioners Associated Gas Distributors (Pet. No. 75-1308, pp. 6-12) and American Public Gas Association (Pet. No. 75-1304, pp. 11-14) contend that the court of appeals applied an incorrect standard in reviewing the Commission's orders. There is no merit to the contention.

In *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-792, this Court held that the responsibilities of a reviewing court were to determine (1) whether the Commission had abused or exceeded its authority; (2) whether each of the order's essential elements is supported by substantial evidence; and (3) whether the order may be expected to "maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable." Further, the "court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself

[6]APGA is incorrect in suggesting that Section 1.20(g) of the Commission's regulations, 18 C.F.R. 1.20(g), requires a formal evidentiary hearing (Pet. No. 75-1304, p. 10). Section 1.20(g) governs the "presentation by the parties" when, and if, the Commission determines that a formal hearing is necessary and when it initiates such a hearing pursuant to Section 1.20(a), 18 C.F.R. 1.20(a). Section 1.20(m), 18 C.F.R. 1.20(m), sets forth the procedures to be utilized in rulemaking. Thus, Section 1.20 merely allows the Commission to implement its broad authority to tailor procedures to the needs of particular cases and cannot properly be construed to require the Commission to hold a formal hearing.

that the Commission has given reasoned consideration to each of the pertinent factors" (*id.* at 792). The Commission's orders are, therefore, entitled to a "presumption of validity," and those who would seek to overturn the orders bear "the heavy burden" of showing that the order is "unjust and unreasonable in its consequences" (*id.* at 767).

In *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283, this Court emphasized that "application of the three criteria of judicial review of Commission orders is primarily the task of the courts of appeals"; that the "responsibility to assess the record to determine whether agency findings are supported by substantial evidence" is, by virtue of Section 19(b) of the Act (15 U.S.C. 717r(b)) the function of the court of appeals; and that this Court therefore will intervene only in the "rare instance when the standard appears to have been misapprehended or grossly misapplied" (417 U.S. at 309-310).

No such "rare instance" is presented here. The court of appeals correctly apprehended and properly applied the review standards enunciated by this Court in *Permian*. The ultimate issue for the court was whether the "end result" of the order was "unjust and unreasonable," and it resolved that issue by applying the criteria established by this Court in *Permian* (Pet. App. A15-A16). The court was "guided by four elements which delimit the scope of our authority" (Pet. App. A15):

> (i) the well-known statutory "substantial evidence" standard, (ii) a judicially recognized "presumption of validity" * * *, (iii) the longstanding "total effect" test of *FPC* v. *Hope Natural Gas Co.*, 1944, 320 U.S. 591, * * * and (iv) a "zone of reasonableness" to compensate for the necessarily imprecise nature of cost determinations and the inherent difficulty of the regulatory undertaking.

The court indicated, however, that its "narrow scope of review" was further "tempered" by the experimental nature of area and national rate regulation, which calls for a "heightened deference to the Commission's expertise" (*id.* at A16-A17).

Applying the *Permian* review criteria to each element of the Commission's order, the court of appeals found that the Commission was authorized to prescribe a "national" rate for new gas sales (*id.* at A20-A23) and that each element of the national rate structure—specific cost findings and methodology—was reasonable and supported by substantial evidence (*id.* at A27-A44).[7] Petitioners argue that the court incorrectly afforded the Commission's orders too

[7]The court below rejected several attacks upon the Commission's cost-based formula raised here by petitioners APGA (Pet. No. 75-1304, pp. 12-14) and Shell Oil Company (Pet. No. 75-1299, pp. 8-11, 15-21): (1) the court found that the Commission's analysis of the evidence leading to a future productivity (the amount of natural gas added to the non-associated gas reserves for every foot drilled) was "supported by the record" (Pet. App. A31-A35); (2) the court found that the parties who had attacked the Commission's use of a discounted cash flow methodology as a supplementary cost analysis had "failed to sustain" their "weighty burden of proof" that the use of such methodology "results in an unjust and unreasonable end result" (*id.* at A37); (3) the court also found the Commission's "policy choice" of excluding an average federal income tax component from the national rate structure, in favor of allowing individual producers to seek extraordinary relief in the form of higher rates when they could demonstrate an "actual income tax liability," was not "so unjust and unreasonable" as to require judicial intervention (*id.* at A37-A39); (4) the court found that the Commission's projections of future lease acquisition costs "are based on substantial evidence and cannot be reversed at this stage" (*id.* at A40); (5) the court additionally held that the Commission's findings regarding the level of the net liquid credit, "a cost equation component of relatively little import," were sufficiently supported by the record (*id.* at A41); and (6) the court held that the Commission did not err in using cost-based ratemaking and in refusing to consider non-cost factors created solely by market forces (*id.* at A44-A45).

limited a review. However, while the "experimental nature" of national rate regulation may have resulted in "heightened deference" to the Commission's expertise, the court below scrupulously examined each element of the Commission's order. Furthermore, this "deference" to Commission expertise in ratemaking orders was a central aspect of this Court's review in both *Permian, supra,* 390 U.S. at 767, 790-792, and *Mobil, supra,* 417 U.S. at 331. The court of appeals correctly concluded that such deference was appropriate here as well, because "national rate regulation is still experimental" (Pet. App. A17).

3. Several petitioners[8] contend that the decision to apply the new national rate to certain renewal contracts for flowing gas was not supported by the record and improperly failed to require recipients to engage in exploration and development. These arguments were correctly rejected by the court of appeals.

(a) Petitioners argue that there is no evidentiary basis to support the allowance of the national rate for sales under new contracts replacing long-term contracts that have expired by their own terms.[9] But the court below found (Pet. App. A29-A30):

> The Commission found from the evidence in the record that a massive commitment of new funds is necessary to alleviate the natural gas shortage and that internally generated sums are a necessary source of such funds. * * * From these facts it reasoned that the national rate structure should be functionally applied to provide some of these funds, placing the burden not

[8]Public Service Commission of New York (Pet. No. 75-1305, *passim*); Associated Gas Distributors (Pet. No. 75-1308, pp. 6-14); APGA (Pet. No. 75-1304, pp. 14-16).

[9]The Commission found a gross disparity between supply and demand and explained that, if the nation's future need for natural

just on "new" gas but also on flowing gas for which the primary contract had expired.

Petitioners have not shown that the court of appeals has "misapprehended or grossly misapplied" the substantial evidence standard. *Mobil, supra,* 417 U.S. at 310. Moreover, the Commission's use of price functionally to encourage exploration and development, and specifically its determination that the burden of future exploration and development should be borne in part by consumers of flowing gas, were upheld by this Court in *Mobil, supra,* 417 U.S. at 319-321. The specific mechanism chosen by the Commission to accomplish that end in the national rate case—applying the national rate to certain renewal contracts for flowing gas—has been sanctioned by the two courts of appeals that have previously addressed the issue. *Shell Oil Co.* v. *Federal Power Commission,* 491 F.2d 82 (C.A. 5); *Public Service Commission for the State of New York* v. *Federal Power Commission,* C.A. D.C., Nos. 73-1647, *et al.,* decided January 27, 1976, pending on petitions for certiorari, Nos. 75-1556, 75-1565.

(b) Petitioners suggest that even if it is permissible to increase the rate for flowing gas, the Commission erred in not requiring the producers receiving the rate increase to engage in exploration and development. The Commission determined that imposing a specific exploration and development commitment as a condition of a rate increase in replacement contracts was not necessary, believing instead "that by requiring an old contract to be renegotiated before the new rate is recoverable, the pipeline might be able to negotiate for additional acreage dedication to interstate commerce, or exploration and development activity on previously dedicated acreage or other concessions for the price increase" (Pet. App. A29). Petitioners argue that in a time of natural gas shortage the pipeline negotiating a replacement contract will not be in a position to bargain for any increased gas supplies for the interstate market. In essence, petitioners seek to substitute their judgment for that of the Commission, but they have not carried their "heavy burden of making a convincing showing that [the Commission's judgment] is invalid because it is unjust and unreasonable in its consequences." *Mobil, supra,* 417 U.S. at 307, quoting *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602. As the court below correctly concluded, "the Commission has exercised its discretion after considering all pertinent options" and has "reached a well-considered, expert decision on this issue" (Pet. App. A29).

(c) In contrast to the consumer petitioners, Superior Oil Company (Pet. No. 75-1474, pp. 8-17) argues that it was illegal and arbitrary for the Commission to require a newly executed sales contract as a condition of receiving the national rate. Superior contends that the Commission lacks the authority to compel a producer and a pipeline to enter into a contract (*id.* at 10). But the Commission has not required the execution of a contract; nor has it dictated the terms of a contract if one is entered into. Under the Commission's order, the parties remain free to contract or not to contract and to determine the terms of their service contracts. Cf. *Federal Power Commission* v. *Sierra Pacific Power Co.,* 350 U.S. 348; *United Gas Pipe Line Co.* v.

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gas was to be satisfied, massive capital commitments were necessary to expand programs of exploration and development (Pet. App. C26-C28). It found that, but for the generation of internal capital through rate relief, the essential expansion of exploration and development would not take place (*id.* at D55-D56). The Commission acknowledged the impact upon the consumer in terms of the increased price of gas supplies (*id.* at D56-D62), but it concluded that the increased consumer cost attributable to higher well-head gas prices was more than counterbalanced by the greater assurance of continued service (*id.* at D60).

Mobile Gas Service Corp., 350 U.S. 332. The Commission has simply determined that, if a replacement contract is executed, the newly-prescribed national rate should be applicable because of the possibility that the pipeline may be able to bargain for additional acreage dedication, increased exploration and development activity, or other concessions for the rate increase. However, if the national rate were allowed with or without a new contract, a producer would be released from any obligation to bargain with a pipeline, thus eliminating any possibility of a *quid pro quo* for the rate increase.[10]

4. The Commission required producers, as a condition of receiving the national rate for "new gas," to waive their right to utilize such gas to discharge refund obligations and trigger contingent escalations under the incentive provisions of prior area rate orders. Shell Oil Company (Pet. No. 75-1299, pp. 11-15), California Company (Pet. No. 75-1289, *passim*), and Superior Oil Company (Pet. No. 75-1474, pp. 18-25) contend that this requirement is an illegal retroactive modification of prior rate orders.

However, by determining that gas sold at the national rate level cannot be used to take advantage of certain

[10]Arguments that the requirement of a replacement contract is anticompetitive (Pet. No. 75-1474, pp. 15-17) and unduly discriminatory (*id.* at 17-18) are unfounded. There is no evidence in the record to support these assertions. Furthermore, the objections are premature. As the court below recognized, the Commission has "expressly reserved for consideration in the biennial review the question of whether the pipelines are negotiating in good faith or trying to take advantage of the producer's locked-in position, and whether or not the additional funds generated by the application of the new rate increase 'the level of monies committed to exploration and development programs and the volumes of new gas supplies dedicated to interstate pipelines under long-term contracts' " (Pet. App. A30).

incentive provisions in prior rate orders, the Commission did not retroactively modify those orders. To the contrary, the incentive features of those orders are still operative. Each producer has a choice. He may sell his gas under the national rate structure without refund discharges and contingent escalations, or he may continue to sell at the rates prescribed in the area rate orders and avail himself of the refund discharge and contingent escalation provisions of those orders. In other words, the Commission has done nothing more than provide producers with a new alternative rate system which, as the court below correctly found, "is an exercise of Commission discretion which does not amount to retroactive rate regulation" (Pet. App. A42).[11]

Furthermore, the incentive provisions in the prior area rate orders were designed to operate in conjunction with the prescribed base *area* rate levels. As the Commission said, "the rates established in those opinions were determined to be sufficient to encourage exploration and

[11]An identical disposition was reached by the United States Court of Appeals for the District of Columbia Circuit in *Moss* v. *Federal Power Commission*, 502 F.2d 461 (C.A. D.C.), reversed on other grounds, No. 74-883, decided March 3, 1976. The court of appeals reviewed the Commission's optional certificate procedure and upheld the provision under which a producer who obtains an optional certificate must waive his right to benefit from any contingent escalations or refund discharges that might be triggered in the area in which his sale under the optional procedure is made. The producers in that case argued, as do the petitioners here, that they were entitled to benefit from the previously established incentives *and* to sell their gas in excess of the area ceiling rate pursuant to the optional certificate procedure. The court there reasoned that in prescribing the optional procedure the Commission had provided an alternative for each producer: "[h]e may dedicate his new gas under the procedure that is most beneficial to him. * * * He may benefit under one procedure but not under both" (502 F.2d at 470). Similarly, under the orders here, a producer may sell his gas at the national rate without the incentives, or at the area rate with the incentives, but not both.

development activities when coupled with the refund credit incentives and contingent escalations" (Pet. App. C110). To allow new dedications of gas to receive the national rate and, at the same time, discharge refund obligations or trigger contingent escalations would therefore be "an apostasy of the Commission's area rate opinions which adopted the contingent escalations and refund credits as part of a rate structure which included the then prevailing area rates for flowing gas and new gas" (Pet. App. D65).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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